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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From The United States District Court
For The Northern District Of Ohio

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the specially constituted district court of three judges (R 1404-1446) is reported at 241 F. Supp. 974.

The report, supplemental report and second supplemental report of the Interstate Commerce Commission (R 263-315, 383-393, 504-512) appear at 307 I.C.C. 493, 312 I.C.C. 277, and 317 I.C.C. 502 respectively.

JURISDICTION

This proceeding was brought in a three-judge federal district court under 28 U.S.C. 1336, 2284, 2321-2325, to set aside orders of the Interstate Commerce Commission. The judgment of the court setting aside the orders was entered on April 30, 1965 (R 1447-1448), Notice of Appeal (R 1465-1468) by Railroad Appellants was filed on June 18, 1965. The jurisdiction of this court rests on 28 U.S.C. Sections 1253 and 2101(b). Probable jurisdiction was noted by this court on November 15, 1965 (R 1473). The jurisdiction of this court is invoked under 28 U.S.C. 1253 and 2101(b), *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56, *United States* v. *Drum*, 368 U.S. 370.

STATUTES INVOLVED

The statutory provisions involved are the National Transportation Policy, Sections 1(18) and 5(2)(a) and (b) of the Interstate Commerce Act (49 U.S.C. 142, 1, 5) and Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)) set forth in the Appendix to this brief.

QUESTIONS PRESENTED

Appellants (Applicants)* applied to the Interstate Commerce Commission for authority to serve the facilities of the Chicago Regional Port District at Lake Calumet, near Chicago in Cook County, Illinois.

The Commission found that the present and future public convenience and necessity requires construction by

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*Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company.

certain of the applicants of a line of railroad to the Lake Calumet Harbor Port of Chicago and operation under lease by applicants over the existing tracks of the Port District at Lake Calumet Harbor and that acquisition of trackage rights by certain applicants over the line to be constructed and certain existing tracks would be consistent with the public interest. The questions presented are:

1. Did the district court err in finding that the Commission failed to make all the findings necessary to support its decision and that the findings made were unsupported by substantial evidence in the record?

2. Was the district court in error in concluding that the Commission's exercise of discretion in its refusal to grant a rehearing when a lease arrangement between appellants and the Port District for use of the latter's tracks was submitted to the Commission for approval was a denial to Nickel Plate* and the Rock Island of due process of law, in the light of the fact that a comparable lease had been offered in evidence at the hearing, at which time Nickel Plate and Rock Island were afforded ample opportunity to cross-examine the parties and offer evidence with respect to said lease, and particularly in view of the fact that the terms of the amended executed lease were more favorable to all the railroads, including Rock Island and Nickel Plate, than the terms of the original lease?

3. Did the district court err in finding the Commission erred in the exercise of its discretion in refusing to grant a further hearing on applicants' supplements to applications, in the light of the fact that said supplements were filed at the request of the Commission to cure a technical deficiency in the original applications, and in the light of

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* Nickel Plate, now Norfolk and Western, is not a party to this appeal to this Court.

the fact that evidence in support of said supplements was already a matter of record and the Commission had so found?

4. Did the district court err in vacating and setting aside the reports and orders of the Commission dated October 5, 1959, September 19, 1960, and November 26, 1962, and the order of the Commission dated August 23, 1962, and enjoining the Commission from enforcing such reports and orders and remanding the case to the Commission for the taking of further evidence upon all of the issues?

STATEMENT OF THE CASE

Involved here is the validity of reports and orders of the Interstate Commerce Commission granting applicants authority under Sections 1(18) and 5(2) of the Interstate Commerce Act to construct certain tracks and operate under trackage rights to serve the facilities of the Chicago Regional Port District at Lake Calumet, near Chicago, in Cook County, Illinois, now served exclusively by Chicago, Rock Island and Pacific Railroad Company (Rock Island).

Lake Calumet, a commercial and industrial area with facilities such as grain elevators, warehouses, cold storage places, trucking terminals, railroad tracks, and transit sheds is the major deep water facility of the Port of Chicago. (R 578) It is in the heart of the city's switching district, contiguous to major arterial highways and presents one of the greatest potentials for the generation of traffic in the mid-continent area of the United States. (R 569-570) Lake Calumet, a public harbor, while presently served by only one railroad is open to all trucking companies, barge lines, and steamships, and it is designed

to become a dominant gateway for export grain. (R 582-583, 592-593)

The Chicago Regional Port District (a municipal corporation which operates the Port), shippers and receivers, tenants at the Port, shippers in the states tributary to Lake Calumet Harbor, the Board of Trade of Chicago, the Association of Commerce and Industry, and the United States Department of Agriculture supported the application, stressing the need for multiple rail service to insure the growth of the Port. (R 721-754, 759-792, 841-929)

Referring to the Commission's report, the district court stated:—

> "Among the important findings for which we find substantial support in this record are the following:
>
> > 'Lake Calumet Port is the major deep-water port facility of the port of Chicago. It is in the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.
> >
> > 'The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will become a dominant export gateway for grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.'" (R 1409)

The Lakes-to-the-Gulf Waterway, the opening of the St. Lawrence Seaway and the completion of the Calumet-Sag Channel (Mississippi River to Lake Michigan), will

accelerate the growth of Lake Calumet Harbor and make it one of the busiest ports in the country. (R 291) There is a potential within 10 or 12 years of 250,000 to 350,000 cars moving annually. (R 294, 587, 620, 622-623)

The district court again noted that among the important findings for which it found substantial support in the record were the following:

> "When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports, there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.
>
> "Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.
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>
> "When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 per cent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land

carriers and the watercarriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

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"Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory." (R 1409-1410)

• • •

"Some indication of future traffic through the port may be determined from the business generated in the immediate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilities at the lake are not expected to be utilized to capacity for several years, and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion." (R 1411)

Multiple rail service to the Port by applicants, the record disclosed, would provide:

(1) single-line switching service and charges. (R 293, 588, 613, 658-659, 725, 741, 745, 750, 889, 922) The Commission so held. (R 293, 304-305, 309)

(2) adequate car supply, thirty times that of Rock Island. (R 293, 298, 589, 613, 726, 747, 752, 760, 771, 922, 1130, 1132, 1133, 1134) (Ex. H-17, 27, 40, 49) The Commission so held. (R 298, 309)

(3) additional supporting rail yards with capacity of 61,601 cars, or more than twelve times that pres-

ently able to serve the Port through the Rock Island. (R 596-597, 661, 673, 688-689, 696, 699-702, 706, 736-738, 747, 752, 760, 872, 922). The Commission so held. (R 284-289, 311)

(4) protection against strikes. (R 589, 613, 771) The Commission so held. (R 293)

(5) fast, competitive rail service. (R 589, 613, 725-726, 905, 922, 926) The Commission so held. (R 309)

(6) minimum turn-around time for large vessels. (R 919-920) The Commission so held. (R 296, 298-300)

(7) 1,917 industries in the Chicago switching district with direct, single-line service to the Port. (R 304-305, 658-664, 668, 713, 741) The Commission so held. (R 304-305)

(8) the elimination of delays connected with the interchange of cars between the line-haul carrier and the delivering carrier. (R 304-305, 658-664, 668, 713, 741) The Commission so held. (R 304-305)

(9) the removal of a detriment and hindrance to the Port which is presently limited to the services of one trunk-line railroad. (R 293-294, 619-625, 726, 745, 751, 760, 763, 770, 776-777, 846-856, 894, 899, 916-917) The Commission so held. (R 310)

(10) placement of applicants on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, with applicants retaining control of their freight equipment made empty at the Port so that such equipment could be returned with fast shuttle service to country elevators without loss of time by interchange. (R 759-772, 880-882) The Commission so held. (R 310)

The Commission based its conclusions that the applications should be granted upon these facts of record.

However, the district court found, "We feel that this record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above." (R 1415) The facts of record to which the district court made reference when it stated there was not ample support in the record are matters of rail competition, better service, greater car supply, lower rates, the control of freight equipment without loss of time, and the elimination of delays by providing single-line service. (R 1414)

The district court, however, did find that there was substantial support in the record for the following:

> "Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory.
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> "*Applicants' plan of operation.*—Witnesses on behalf of the applicants emphasize the fact that a large port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times that presently available to serve the port through the Rock Island.
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> "The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic." (R 1409-1411)

Applicants submitted a proposal to the Port District to lease the latter's tracks and other facilities provided for railroad purposes and to maintain such tracks and facilities and afford switching service necessary on such tracks to meet the requirements of the shippers at the Port. The lease would include rental based on 5% of an agreed valuation but not to exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotive handled to or from the property during such year. The lease, after being the subject of cross-examination, was admitted in evidence. (R 798-800) It was approved by the Commission, subject to the elimination of an objectionable clause. (App. Ex. H-64) (R 278-280, 1135, 801)

The method proposed by the applicants to reach and serve the Port is the same as used in similar areas, a common operating practice, is economical as well as practical. The joint facility plan has many advantages, in that the switching operations required on the part of all the railroads within the Port may be coordinated and performed by a joint switch engine or engines under the supervision and direction of the person so designated by the applicants without favoritism or discrimination. By the joint arrangement, cars of each of the railroads, as and when required by industries, could be placed at one spotting. There would be no duplication of switching, resulting in substantial saving in time and money, as cars would be loaded or unloaded more quickly and would be handled into and out of the Port with greater dispatch than if all railroads in the Port did their own switching. (R 312, 491-496, 678, 682, 750, 833, 890) The Commission so held. (R 289) The memorandum of understanding between applicants governing the operation of the joint facility was offered and received in evidence. (App. Ex. H-29) (R 490-496)

Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the Port, applicants would be in a position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic. (R 682, 750, 890) The Commission so held, (R 290) and the district court so found. (R 1411)

Rock Island contended that the expense represented by charges for trackage rights and other charges involved in the operation by applicants into the Port would exceed the revenues to be derived from such service under applicable tariff provisions, that the Commission should not authorize an operation which would result in a deficit for the applicants.

The Commission found:—

> "The record shows that if direct service by the applicants to the port is permitted, the line-haul business, without doubt, will provide profitable operations for the applicants. As for the crosstown switching service, the charges to be assessed are indefinite, and no doubt will be adjusted to cover actual costs for the service provided. We are convinced, on this record, that the service to the port proposed by the applicants will not be improvident."

Rock Island contended that applicants' original applications were deficient in failing to request authority under Section 1(18) of the Act to operate over the tracks of the Port District, although Rock Island has, for many years, operated over said tracks without such authority. The Commission found that the proposed operation over the Port tracks would require its specific approval.

Applicants, in compliance with the Commission's findings, filed supplements to their applications to cure the aforesaid technical deficiency and to eliminate the objectionable clause in the lease of the Port tracks and facilities. (R 329-349, 368-383)

The Commission, in a supplemental report of September 19, 1960, (312 I.C.C. 277), (R 383-393), denied the request of the Nickel Plate and Rock Island for further hearing, and granted the authority requested since the evidence presented at the initial hearings pertained to service over the Port tracks to serve the facilities within the Port District.

The Commission found the lease agreement as amended to be reasonable and adequate, but cautioned that any further change in its terms and provisions would require the Commission's prior approval and authority. The Commission found that protestants (Nickel Plate and Rock Island) had been afforded unlimited opportunity to cross-examine applicants' witnesses with reference to the provisions of the lease and had availed themselves of a petition for reconsideration of the Commission's order of October 4, 1959, which directed modification of the lease as originally presented. (R 383-395)

In its second supplemental report dated November 26, 1962, (317 I.C.C. 502), the Commission noted that the Port District on June 12, 1961, executed a modified agreement which differed to a degree from the terms of the approved lease agreement, approval of which was requested by applicants by petition filed December 1, 1961. The Commission pointed out that the question of public convenience and necessity had been determined with only the specific terms and conditions of the operations remaining for approval and the objection of protestants was

merely a reiteration of their objections for the over-all proposals of applicants. The Commission denied the request of the Nickel Plate and Rock Island and found a hearing on the modified agreement was unwarranted. (R 504-513)

Specifically, the modified agreement removed the valuation basis for rental payments and substituted therefor a flat user-basis charge of $2.00 per revenue car only. The Commission stated that it had never adopted an exclusive formula to determine reasonableness of proposed rentals of railroad trackage. Rentals were considered reasonable where, as in the instant case, after arm's length bargaining, the parties reached an agreement which resulted in improved service to the public, financial benefit to all parties, and protestants' ability to continue to serve the public would not be impaired. The changes in the agreement the Commission noted would obviously redound to the benefit of the railroads. The Commission stated the modified agreement was reasonable and adequate to accomplish the purpose for which it was intended. (R 508)

SUMMARY OF ARGUMENT

The district court erred in concluding that the findings of the Commission concerning rail competition, better service, greater car supply, lower rates, the control of freight equipment without loss of time, and elimination of delays through direct-line service were not supported by substantial evidence.

The testimony of the Manager of the Chicago Regional Port District, of the shippers and receivers located at the Port and in the states tributary to Lake Calumet Harbor, of the representative of the Board of Trade, of the Chief Executive of the Association of Commerce and Industry,

and of the representative of the United States Department of Agriculture completely refutes the court's conclusion.

Paradoxically, the district court unanimously found, "Among the important findings for which we find substantial support in this record" were those describing the advantages of Lake Calumet Port due to its location, its access to all modes of transportation, its prospects of becoming "a dominant export gateway for grain," its growth, present and future greatly stimulated by the opening of the St. Lawrence Seaway which will increase the size and number of the vessels engaging in Great Lakes overseas cargo transportation.

The district court agreed that there was substantial support in the record for the finding of need for "a substantially broadened railroad service into and out of Lake Calumet Port," that high level service is mandatory in international commerce, that adequate supporting rail facilities are necessary to the efficient operation of a large port and applicants have a yard capacity 12 times that available through Rock Island.

The court agreed that there was substantial support in the record for the finding that applicants' plan of operation entailed a more direct movement, less handling, less expense due to elimination of switching charges.

Finally, the court agreed that the record provided substantial support for the findings concerning the future increases in tonnage, the building of additional facilities and the need for a plan and system for handling the transportation needs of the port to aid in the progress and expansion of the port.

The district court erred in concluding Rock Island was denied due process by the Commission's refusal to grant

further hearings because (1) Rock Island was fully aware, prior to and at the hearing, of the scope of the authority sought by applicants and the mere technical deficiency of the applications which was later cured was insufficient grounds to require a re-trial of the same issues; (2) the questions as to whether a rehearing should be granted is entirely within the province of the Commission; and (3) the instruments which would govern applicants' operations within the Port were presented at the hearing, subject to cross-examination and were received in evidence. The evidence is clear that the final lease as approved by the Commission varied from the original lease received at the hearing only to the extent that by its terms it made the operations more provident for the rail carriers and the Commission so found.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMMISSION FAILED TO MAKE ALL THE FINDINGS NECESSARY TO SUPPORT ITS DECISION AND THAT THE FINDINGS MADE WERE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The district court misconceived not only the effect of the Commission's action in this case but also its own function. The district court erroneously assumed that it was the arbiter of the paramount public interest although by the very terms of the statute this was the business of the Commission. The district court should have limited itself to ascertaining whether there was warrant in the law and facts for what the Commission has done.

The district court erred in two respects in its treatment of the record: (1) its finding that the record does not offer ample support in fact and in law for the conclusions of the Interstate Commerce Commission, and (2) its finding that there is insufficient evidence to support the grant to applicants of a certificate of public convenience and necessity to operate within the Port District. (R 1415, 1419)

The first error is purely mechanical. The district court had previously found that on the important issue affecting public convenience and necessity there was "substantial support in the record." (R 1409)

On the very important matters which the court stated there was not support in the record, the evidence overwhelmingly supports the Commission's finding that the

grant of authority to the applicants to operate within the Port District would provide: (1) single-line switching service and charges. (R 293, 588, 613, 658-659, 725, 741, 745, 750, 889, 922); (2) adequate car supply, thirty times that of Rock Island. (R 293, 298, 589, 613, 726, 747, 752, 760, 771, 922, 1130, 1132, 1133, 1134) (Ex. H-17, 27, 40, 49); (3) additional supporting rail yards with capacity of 61,601 cars, or more than twelve times that presently able to serve the Port through the Rock Island. (R 596-597, 661, 673, 688-689, 696, 699-702, 706, 736-738, 747, 752, 760, 872, 922); (4) protection against strikes. (R 589, 613, 771); (5) fast, competitive rail service. (R 589, 613, 725-726, 905, 922, 926); (6) minimum turn-around time for large vessels. (R 919-920); (7) 1,917 industries in the Chicago switching district with direct, single-line service to the Port. (R 304-305, 658-664, 668, 713, 741); (8) the elimination of delays connected with the interchange of cars between the line-haul carrier and the delivering carrier. (R 304-305, 658-664, 668, 713, 741); (9) the removal of a detriment and hindrance to the Port which is presently limited to the services of one trunk-line railroad. (R 293-294, 619-625, 726, 745, 751, 760, 763, 770, 776-777, 846-856, 894, 899, 916-917); and (10) placement of applicants on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, with applicants retaining control of their freight equipment made empty at the Port so that such equipment could be returned with fast shuttle service to country elevators without loss of time by interchange. (R 759-772, 880-882)

At the hearing applicants offered in evidence a memorandum of understanding between applicants governing the operation of the joint facility to better serve the facilities of the Port District. The memorandum of

understanding was not executed by the applicants but was received in evidence subject to cross-examination. (App. Ex. No. H-29) (R 490-496)

The proposal of applicants to the Port District to lease and maintain the latter's tracks and facilities was introduced and the terms of it were the subject of cross-examination. Included at that time was a rental based on 5% of an agreed valuation but not to exceed an amount equivalent to $2.00 per car loaded or empty or a locomotive handled to or from the Port. (App. Ex. H-64) (R 278-280, 1135, 801)

A provision in the original lease agreement whereby the Port District agreed not to permit another railroad to operate the facilities on its property for the purpose of serving the harbor area was found objectionable in that it tended to unduly restrain competition and applicants were directed to eliminate the condition. (R 278-280) No other provision of the lease was found to be objectionable.

Because the original applications were technically deficient in failing to request authority to operate over the Port District tracks, supplements to the applications were filed to cure the deficiency and to resubmit the lease as modified for the Commission's approval. (R 329-334, 335-337, 343-348) (App. Ex. S-1; R 337)

The Rock Island challenged the terms of the lease contending that the undertaking by applicants under the terms of the lease would be improvident. The Commission found the lease as modified to be acceptable.

In its supplemental report of September 19, 1960, the Commission stated:

> "With the exception of the revision ordered, the principal provisions of the lease are identical to the

agreement originally considered by us. The condition imposed in our order was an express mandate to the parties to perfect the lease which has been done and now resubmitted to us according to that mandate. The description of the property covered is identical to the description in the original document and is fully supported by accompanying exhibits.

"We find that the lease agreement, as amended, is reasonable and adequate to accomplish the purpose for which it is intended. * * *

"The protestants contention that they should have full opportunity and right of cross-examination with respect to the revised lease is without substance. The record shows they have had unlimited opportunity to cross-examine with reference to the provisions of the lease and availed themselves of petition for reconsideration of our order of October 5, 1959, which directed the modification of the presented lease." (R 391-392)

Pursuant to the authority granted, appellants entered into an agreement with the Port District which was found "to differ to some extent from the terms of the aforesaid approved lease agreement." (R 505) Under the circumstances, the applicants by petition filed December 1, 1961, requested approval of the modified agreement. The variations between the proposed lease agreement and the modified agreement were noted and analyzed by the Commission which, in a second supplemental report of November 26, 1962, found "—the modified agreement for the non-exclusive use of the Port District's tracks and facilities is reasonable and adequate to accomplish the purpose for which it is intended." (R 511) The Commission had found that the operations could be profitably undertaken pursuant to the terms of the original lease agreement, i.e.,

"if the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction." (R 310)

All that remained was to analyze and compare the terms of the modified agreement to those of the proposed lease agreement. Stated briefly, the evidence to support the Commission's approval of the modified agreement includes not only the terms of that agreement as analyzed in the Commission's second supplemental report, but includes also the terms of the proposed lease agreement contained in the initial report upon which the Commission based its comparison of economic feasibility.

The Commission noted in its second supplemental report that the elimination in the modified agreement of the rental based on the valuation of the trackage would redound to the benefit of the applicants. The Commission emphasized:

"We have never adopted any exclusive formula for determining the reasonableness of proposed rentals for railroad trackage. We believe that rentals generally may be considered reasonable where, as here, the facts of record disclose that non-affiliated parties, after bargaining at arms length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired." (R. 508)

The district court failed to recognize that the Commission had found the rental rates in the proposed lease favorable to applicants and approved operations thereunder, and on the basis of the rates in the modified agreement the Commission found that their economic

impact was even more favorable to applicants than those rates previously approved. Thus, the conclusion of the district court that there was insufficient evidence to show that the proposed operation could be profitably undertaken was contrary to the record and represents an attempt by that Court to substitute its judgment for that of the Commission.

When the court found the Commission had made important findings of fact and further found that the record supported such findings, the judicial function of the court was exhausted. The orders of the Commission, this court has decreed, should not be set aside, modified, or disputed by a court on review if they lie within the scope of the Commission's statutory authority and are based upon adequate findings which are supported by substantial evidence even though the court might reach a different conclusion on the facts presented. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 165 F. Supp. 893, 900 Aff'd. 361 U.S. 173; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535; *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 574.

The Commission found approval of the applications would result in greater rail competition which in turn would stimulate better service which was required for the future development of the industries at the Port. The district court in declaring without further comment "We feel that this record does not ample support in fact and law for the conclusions of the Interstate Commerce Commission" again was guilty of a mechanical error in citing, presumably in support of its position, this Court's decision in *Chesapeake and Ohio Railway Co.* v. *United States,* 283 U. S. 35, and *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83. Applicants

had cited these cases in brief to the district court in support of the Commission's order which had found a need for additional rail competition as the Port facilities developed, and the dissenting opinion of the district court cites the cases in support of its dissent.

In the former case this Court stated:

> "And the Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. Construction of Lines in Eastern Oregon, 111 I. C. C. 3, 37. Construction of Line by Wenatchee Southern Ry., 90 I. C. C. 237, 257." (283 U. S. 35, 43)

In the latter case this Court stated:

> "No carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers." (355 U. S. 83, 91)

There is a presumption that the Commission has properly performed its official duties and this presumption supports its official acts. *Shein* v. *United States,* 102 F. Supp. 320, 323; aff'd. 343 U. S. 944; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 358-359; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15.

The court must give due credit to the expertness of the Commission in the field Congress has confided to it. *National Bus Traffic Association* v. *United States,* 143 F. Supp. 689, 696; aff'd. 352 U. S. 1020.

II.

THE COMMISSION'S REFUSAL TO GRANT FURTHER HEARING ON THE SUPPLEMENTAL APPLICATIONS WHICH WERE FILED TO CURE A TECHNICAL DEFICIENCY WAS NOT A DENIAL TO ROCK ISLAND OF DUE PROCESS OF LAW.

The district court's conclusion that the Rock Island was denied certain procedural rights is premised on the alleged failure to give Rock Island timely notice before the hearing contrary to the Administrative Procedure Act and provisions of Section 1(18) of the Interstate Commerce Act. There can be no doubt but that Rock Island had notice of the scope of the applications filed, and copies of the lease proposal by applicants to the Port District and the memorandum of understanding between the applicants were furnished Rock Island prior to their introduction in evidence.

The applications left no doubt as to the intention of the six railroads to serve the present and future industries, elevators, warehouses, docks and piers in the Calumet Harbor Port area. (R 3, 77) The Rock Island in its petition of intervention cites the purpose of the applications, *i.e.,* "to serve the Chicago Regional Port District which is located adjacent to petitioners' [Rock Island and Pullman Railroad] railroad tracks and is being served by them exclusively." (R 10, 97-98)

Rock Island was estopped to question the validity of the Commission's ruling as to the scope of the applications as supplemented and the evidence received in support of such applications. There can be no subsequent challenging of issues which are actually litigated if there has been actual notice and adequate opportunity to cure surprise. *National Labor Relations Board* v. *Mackay Co.,* 304 U.S. 333, 350; *Consolidated Edison Co. of New York* v. *National Labor Relations Board,* 305 U. S. 197, 228;

United States v. *Pierce Auto Freight Lines,* 327 U. S. 515, 525. If it is clear that Rock Island understood exactly what the issues were, the scope of the applications prior to and at the time of the hearing, they could not thereafter claim surprise or lack of due process because of alleged deficiency in the language of the applications. "Actuality of notice there must be, but the actuality, not the technicality must govern." *Kuhn* v. *Civil Aeronautics Board,* 183 F. 2d 839, 842 (C.A. 4)

The applications did not specifically request authority to operate over the Port District's tracks since applicants, in view of Rock Island's operations without such authority, were of the impression that none was required. All of the evidence submitted by applicants and Rock Island at the hearing related to the public convenience and necessity of operations within the Port District. As previously stated, the economic and managerial terms of the proposed lease arrangement governing applicants' operations over the tracks of the Port District were scrupulously examined by the Commission. The same was true with respect to the memorandum of understanding (joint facility plan). Thus, all evidence submitted by the Chicago Regional Port District, shippers and receivers at the Port and in the tributary states, by the Chicago Association of Commerce and Industry, and the Department of Agriculture concern the proposed operations of applicants to serve the facilities of the Chicago Regional Port District. As the Commission stated, orderly procedure dictated that evidence pertaining to the public need for and the entire plan for additional rail service to and from the Port be presented at the hearing, and that the technical deficiency in the applications as originally filed did not restrict the receipt of such evidentiary material as proof of "the many advantages and benefits of applicants' service for fruition of the plans envisioned and in

the process of being executed on schedule by the Port District", and the impelling need for additional rail service at the Port. The Commission found it was not proper "to revisit upon the applicants and the intervening parties the additional time and expense incident to a long and repetitious hearing." (R 389-390)

Contrary to the conclusion of the court, Section 1(18) of the Interstate Commerce Act, 49 U.S.C.A. 1(18) contains no provision for mandatory hearings on applications to construct or abandon lines of railroad, or for extension of operations over existing lines. Section 1(18) is governed by Section 1(19) which expressly confers on the Commission power to prescribe "rules and regulations as to hearings," and Section 20a(6) provides that the Commission "may hold hearings if it sees fit to enable it to determine its decision." While the language provides that state authorities shall be consulted, the hearing shall be had only if the Commission sees fit. *Woodruff* v. *United States,* 40 F.Supp. 949, 953 (D. Conn.); *Brotherhood of Locomotive Engineers* v. *United States,* 217 F. Supp. 98, 100 (D.C. Ohio 1963)

The opinion in the latter case, decided subsequent to the Commission's report here in question, written by District Court Judge Kalbfleisch with Chief District Judge Connell joining, (the two judges who joined in the majority opinion in the instant proceeding), after quoting Section 1(19) reads,

> "There is thus no statutory requirement of a hearing in that first sentence; rather such matters are clearly left to the Commission's discretion • • •. Thus, both in regard to such hearings as may be accorded to private parties and to the governors of the respective states, the determination of whether hearings will be held is expressly left to the Commission. Therefore, this case was not an adjudication 'required by statute to be determined on the record

after opportunity for an agency hearing * * *" and Section 1007 upon which plaintiffs base their contention of error, did not apply." (217 F. Supp. 98, 100)

Whether petitions for rehearing, reconsideration or re-argument should be granted is a matter resting in the sound discretion of the Commission. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 534-535. Rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 513. Only a showing of the clearest abuse of discretion could sustain an exception to that rule.

CONCLUSION

The judgment should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

Respectfully submitted,

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APPENDIX

National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Sections 1, 301, 901, 1001, and 1231:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(18) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(18) provides:

No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or

extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. § 5(2), provides:

Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control

of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *.

Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(e), provides:

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.